

STUDENT NOTE

# A Comparative Analysis of Defamation Law in the United States and Thailand’s Lèse–Majesté Law: Lessons from the Land of Smiles (But Where the King Never Smiles)

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## Abstract

The United States’ free speech regime, as codified in the First Amendment to the United States Constitution, comes with obvious contrasts to Thailand’s ill-famed lèse–majesté law—Section 112 of the Thai Criminal Code—which prohibits defamation or even truthful degradation of the Thai King and Royal Family. Recent scholarship has focused on such differences and has largely depicted the two regimes as diametric opposites. When viewing the First Amendment and Thailand’s lèse–majesté law in temporal isolation, the recent scholarly consensus has significant merit. However, by analyzing the two regimes over time, similarities arise suggesting that both regimes represent each respective country’s attempt to accommodate competing and changing values present within the respective countries.

**Keywords:** Free speech; defamation; First Amendment; Lèse–Majesté; Section 112; United States; Thailand.

## A. Introduction

The United States stands as the world’s oldest democracy with the “freedom of speech” secured by the First Amendment to the U.S. Constitution, serving as one of the elements of its longevity, dynamism, and success.<sup>1</sup> At least since 1964, when the Supreme Court in *New York Times Co. v. Sullivan* adopted its current approach to the constitutionality of defamation law, the First Amendment has been interpreted to allow for robust free speech, especially in areas concerning public matters.<sup>2</sup> Therefore, federal, state, and local governments within the U.S. are severely restricted when regulating speech. In turn, individuals may discuss public matters, organize protests, and publish opinions without substantial fear of legal liability.<sup>3</sup>

<sup>1</sup>See *Mapped: The World’s Oldest Democracies*, World Economic Forum (Aug. 8, 2019), <https://www.weforum.org/agenda/2019/08/countries-are-the-worlds-oldest-democracies/>. See also Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) (“The value of democratic legitimation occurs . . . specifically through the processes of communication in the public sphere.”); Ashutosh Bhagwat, *Free Speech Without Democracy*, 39 U.C. DAVIS L. REV. 59, 61 (2015) (“The self-governance rationale, which has its roots in Justice Brandeis . . . as well as the in the writings of the philosopher Alexander Meiklejohn, has over the years gained broad acceptance as the primary, if not necessarily the only, reason why the First Amendment protects free speech”); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xi (Free Press 1995).

<sup>2</sup>See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See also *Garrison v. Louisiana*, 379 U.S. 64, 68 (1964); *Snyder v. Phelps*, 562 U.S. 443, 446 (“Accordingly, ‘speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.’”).

<sup>3</sup>See, e.g., *New York Times Co.*, 376 U.S. at 269 (“The constitutional safeguard, we have said, ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes’”).

Things are different in the Kingdom of Thailand, which is among the world's few constitutional monarchies and employs one of the world's strictest *lèse-majesté* laws.<sup>4</sup> The Thai Constitution of 2017 contains a free speech provision—Section 34.<sup>5</sup> It states that “A person shall enjoy the liberty to express opinions, make speeches, write, print, publicise and express by other means.”<sup>6</sup> However, the provision is cabined with the proceeding clause: “The restriction of such liberty shall not be imposed, except by virtue of the provisions of law specifically enacted for the purpose of maintaining the security of the State, protecting the rights of liberties of other persons, maintaining public order or good morals . . .”<sup>7</sup>

Section 112 of the Thai Criminal Code, Thailand's *lèse-majesté* law, is among the laws that restrict the liberties provided by Section 34.<sup>8</sup> It states, “Whoever defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent shall be punished with imprisonment of three to fifteen years.”<sup>9</sup> While various countries have *lèse-majesté* laws, Thailand's is among the few that remain strictly enforced.<sup>10</sup> For instance, one scholar recorded that between 2006 and 2011, more than 400 cases seeking prosecution for violations of the *lèse-majesté* law went to trial.<sup>11</sup> Furthermore, as recently as 2021, a Thai criminal court sentenced a Thai woman to 43 years in prison for gross violation of the law by sharing audio clips on social media that criticized the monarchy.<sup>12</sup> As an example of the law's pervasiveness, in 2016, a Thai woman faced criminal charges for responding to a Facebook post critical of the monarchy with the Thai word “*ja*,” meaning “yeah.”<sup>13</sup> Due to the severe punishments, Thai citizens, and foreigners, must at all times be cognizant of their expressed opinions or statements about the Thai monarchy.<sup>14</sup>

In one sense, the two countries' approaches to speech stand in contrast. The United States legal regime prioritizes free speech concerning public matters, which a monarchy would fall into.<sup>15</sup> In contrast, the Thai legal regime punishes a wide range of speech concerning its monarchy with severe criminal sanctions.<sup>16</sup> Depicting the two legal regimes as diametric opposites has been the focus of recent legal scholarship.<sup>17</sup>

When viewing United States' First Amendment and Thailand's *lèse-majesté* law in isolation, the recent scholarly focus may be correct. The former regime allows for speech critical of public figures while the latter does not. However, with a closer examination of the two regimes over time,

<sup>4</sup>A *lèse-majesté* law prohibits the insult of the monarchy or other head of state. See, e.g., Todd Pitman & Sina Tunsarawuth, *Thailand Arrests American for Alleged King Insult*, ASSOCIATED PRESS (May 28, 2011), <http://perma.cc/GL5R-LCKK>.

<sup>5</sup>CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2560 (2017), s.34.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>See Criminal Code B.E. 2499 (1956), s. 112, amended by Criminal Code (No. 17), B.E. 2547 (2003) (Thai).

<sup>9</sup>*Id.*

<sup>10</sup>See generally, David Streckfuss, *Kings in the Age of Nations: The Paradox of Lese-Majeste as Political Crime in Thailand*, 37 COMP. STUD. SOC'Y & HIST. 445, 463 n.25 (1995).

<sup>11</sup>See Pitman & Tunsarawuth, *supra* note 4.

<sup>12</sup>Commentators consider this sentence the longest ever handed down for violation of the law. See Hannah Beech, *Woman Is Sentenced to 43 Years for Criticizing Thai Monarchy*, N.Y. TIMES (Jan. 19, 2021), <https://www.nytimes.com/2021/01/19/world/asia/thailand-king-lese-majeste.html>.

<sup>13</sup>See *Thailand Lese Majeste: Woman Charged Over Single Word Used on Facebook*, BBC (Aug. 1, 2016), <https://www.bbc.com/news/world-asia-36944205>.

<sup>14</sup>See generally Streckfuss, *supra* note 10, at 445–57.

<sup>15</sup>See, e.g., *New York Times Co.*, 376 U.S. at 270.

<sup>16</sup>See Criminal Code B.E. 2499 (1956), s.112, *supra* note 8.

<sup>17</sup>See, e.g., Sukrat Baber, *Shout for Freedom to Curse at the Kingdom: Contrasting Thai Lèse Majesté Law with United States First Amendment Freedoms*, 24 IND. INT'L & COMP. L. REV. 693, 694 (2014) (“In particular, this Note argues that the two nations represent the extremes of freedom to speak out against power and cultural issues.”); Lauren Nudelman, “Beyond Common Sense:” *the Resurgence of Thailand's Anachronistic Lèse Majesté Law* 4 (Univ. of Chicago Int'l Program Papers, Working Paper No. 83, 2018) (“In its fierce protection of the First Amendment, United States law is the stark opposite to *lèse-majesté*, but serves as a useful contrast for countries that retain the law.”).

more similarities appear.<sup>18</sup> This Article will argue that the free speech regimes of the United States and Thailand are in fact quite similar in that they both represent free speech law's accommodation of competing, unequal, and changing interests. Moreover, this Article will argue that political, religious, and historical forces present in both countries explain how each regime came to its respective accommodation of interests. Part A of this Article will provide an overview of U.S. First Amendment and defamation law, while Part B will focus on the Thai *lèse-majesté* regime. Part C will highlight the similarities and differences between the two systems. Finally, Part D will show that the differences between the two regimes are a result of the differing histories, political philosophies, and religious backgrounds of the two countries.

## B. United States Law

### I. U.S. First Amendment and State Defamation Law

The First Amendment to the United States Constitution stipulates that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>19</sup> The Amendment's text provides that only the Federal Congress shall be prohibited from regulating speech, but through its incorporation doctrine, the Supreme Court has held that the First Amendment binds state governments as well.<sup>20</sup> Further, while only Congress is mentioned in the text, it is generally accepted that the First Amendment protects against encroachment on the freedom of speech by all government actors.<sup>21</sup>

The “freedom of speech” protected by the First Amendment is not absolute.<sup>22</sup> The Supreme Court has repeatedly held that governments may subject speech to reasonable “time, place, or manner” restrictions, including, importantly, the restriction of defamation.<sup>23</sup> Today, twenty-two states have criminal defamation laws of some sort, and all states maintain a private right of action for defamation.<sup>24</sup>

<sup>18</sup>See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974) (“Our accommodation of the competing values at stake in defamation suits by private individuals” explains the legal requirements of defamation).

<sup>19</sup>U.S. CONST. amend. I.

<sup>20</sup>See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Herndon v. Lowry*, 301 U.S. 242, 256 (1937); James Y. Stern, *First Amendment Lochnerism & The Origins of the Incorporation Doctrine*, 2020 U. Ill. L. Rev., 1501, 1503 (2021). *But see* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5, 134 (1949) (assessing the validity of the incorporation doctrine).

<sup>21</sup>See, e.g., *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (“The Free Speech Clause of the First Amendment constrains *governmental actors* and protects private actors.”) (emphasis added); *Knight First Amend. Inst. At Columbia Univ. v. Trump*, 928 F.3d 226 (2d. Cir. 2019) (holding that if the President has created a designated public forum on Twitter, the First Amendment protections apply to the President's maintenance of that forum).

<sup>22</sup>See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 288 (1984) (“Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.”).

<sup>23</sup>*Id.*; see also *Ward v. Rock Against Racism*, 491 U.S. 781, 788 (1989); Nick Suplina, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395, 401 (2005).

<sup>24</sup>See ALA. CODE § 13A-11-160 (2017); FLA. STAT. § 836.01-.06(2023); IDAHO CODE §§ 18-4801-4809 (2021); 720 ILL. COMP. STAT. ANN. 300/1 (2022); KAN. STAT. ANN. § 21-6103 (2017); KY. REV. STAT. ANN. § 432.280 (West 2021); MASS. GEN. LAWS ANN. ch. 272 (2023), § 98C; MICH. COMP. LAWS § 750.370 (2021); MINN. STAT. § 609.765 (2021); MISS. CODE ANN. § 97-3-55 (West 2017); MONT. CODE ANN. § 45-8-212 (2023); NEV. REV. STAT. ANN. § 200.510 (2021); N.H. REV. STAT. ANN. § 644:11 (2021); N.M. STAT. ANN. § 30-11-1 (West 2021); N.C. GEN. STAT. ANN. §§ 14-47, 15-168 (2020); N.D. CENT. CODE ANN. § 12.1-15-01 (2021); OKLA. STAT. ANN. tit. 21, §§ 771-774, 776-778 (2021); S.C. CODE ANN. § 16-7-150 (2023); S.D. CONST. art. VI, § 5; UTAH CODE ANN. § 76-9-404 (2021); VA. CODE ANN. § 18.2-417 (2021); WIS. STAT. ANN. § 942.01 (2021); TEX. FIN. CODE ANN. §§ 59.002 (West 2021); RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977); see also *Map of States with Criminal Laws Against Defamation*, ACLU, <https://www.aclu.org/issues/free-speech/map-states-criminal-laws-against-defamation> (last visited Jan. 10, 2024) (the page mentions that 24 states have criminal defamation laws; however, Louisiana recently repealed its criminal defamation law).

In 1964, the Supreme Court adopted its current approach to the constitutionality of defamation restrictions on speech in two seminal cases.<sup>25</sup> Vested with the power of judicial review, the Supreme Court has the authority to dictate how far defamation may go without intruding into the protections of the First Amendment.<sup>26</sup> In *New York Times Co. v. Sullivan*, the Court addressed such restrictions in the civil context. In his opinion for the majority, Justice William Brennan recognized that the First Amendment established a “marketplace of ideas” that could foster political change.<sup>27</sup> He explained that this judicially recognized market for the “interchange of ideas” existed within a broader “background of a profound national commitment to the principle that debate on public issues should be uninhabited, robust, and wide open.”<sup>28</sup> Therefore, the Court held, the First Amendment should protect a broad array of speech concerning public officials, including speech that may be false.<sup>29</sup>

If the First Amendment’s protections did not apply to false speech, Justice Brennan reasoned that “would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true.”<sup>30</sup> To avoid this chilling effect, the Court held that the First Amendment’s protection of speech about public officials mandates a showing of “actual malice,” meaning that the defamer made the statement with knowledge of its untruthfulness or with “reckless disregard of whether it was false.”<sup>31</sup>

In *Garrison v. Louisiana*, the Court extended First Amendment protections recognized in *New York Times* to state criminal defamation laws for instances where the defamatory speech concerned public officials.<sup>32</sup> The Louisiana state law at issue in the case had an “actual malice” requirement that aligned with common law’s definition, meaning “hatred, ill will or enmity or a wanton desire to injure.”<sup>33</sup> Given its recent decision in *New York Times*, the Supreme Court clarified that the common law’s actual malice requirement was inadequate protection for speech directed at public officials.<sup>34</sup> The Court explained that “the *New York Times* standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false” and applies in both civil *and* criminal contexts.<sup>35</sup>

To clarify the reach of the *New York Times* standard, the Supreme Court in *Curtis Publishing Co. v. Butts* held that the *New York Times* standard of malice applies in defamation cases surrounding “public figures” that are not “public officials”—such as the University of Georgia football Coach Wally Butts, the respondent in the case.<sup>36</sup> Finally, in *Gertz v. Robert Welch, Inc.*, the Court held that the *New York Times* standard does *not* apply in civil defamation cases between private individuals—individuals that are not public officials or public figures—even if the speech involved is a “public matter.”<sup>37</sup> The Court further held that in civil cases between private

<sup>25</sup>See, e.g., *New York Times Co.*, 376 U.S.; *Garrison*, 379 U.S.

<sup>26</sup>See *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>27</sup>See *New York Times Co.*, 376 U.S. at 269 (stating that the First Amendment was “fashioned to assure unfettered interchange of ideas for the bringing about political and social changes desired by the people.”).

<sup>28</sup>*Id.* at 270.

<sup>29</sup>See *id.*

<sup>30</sup>*Id.* at 280.

<sup>31</sup>*Id.* at 279–80.

<sup>32</sup>See *Garrison*, 379 U.S. at 75 (“Hence the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection.”).

<sup>33</sup>*State v. Garrison*, 154 So.2d 400, 423 (1963) (“In the popular sense, the term malice means hatred, ill will or hostility to another.”).

<sup>34</sup>See *Garrison*, 379 U.S. at 79.

<sup>35</sup>*Id.*

<sup>36</sup>See *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335–36 (1974) (“Three years after *New York Times*, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of ‘public figures.’ This extension was announced in *Curtis Publishing Co. v. Butts*.”).

<sup>37</sup>*Gertz*, 418 U.S. at 348–52.

individuals, a plaintiff may only recover for actual injury, and therefore compensatory but not punitive damages may be awarded.<sup>38</sup>

While the Supreme Court in *New York Times* and its progeny clarified the contours of speech that the U.S. government could not punish, importantly, the cases simultaneously clarified the contours of speech that U.S. governments *could* punish. In both *New York Times* and *Garrison*, the Court rejected the view of Justice Hugo Black, who contended in his concurrences in both cases that the First Amendment does “not merely ‘delimit’ a State’s power to award damages to ‘public officials against critics of their official conduct’ but completely prohibits a State from exercising such a power.”<sup>39</sup> By rejecting Justice Black’s view, the Court made it clear that a state could still impose civil or criminal liability on citizens who knowingly make false statements about public officials and figures or make false statements about public officials and figures when acting with a reckless disregard for the truth.<sup>40</sup> Further still, by not extending the *New York Times* standard to civil actions between private individuals, the Court allowed for a state to impose civil liability even in cases when the plaintiff has not shown that the defendant acted with knowledge of falsehood or reckless disregard for the truth.<sup>41</sup>

In sketching these standards, the Court recognized a trade-off articulated by Justice Lewis Powell in his majority opinion in *Gertz*. There, the justice recognized that defining the intersection of the First Amendment and punishable defamatory speech represents an “effort to define the proper accommodation between [the] competing values” of “vigorous and uninhibited” speech and “the legitimate state interest in redressing wrongful injury.”<sup>42</sup> When striking the balance between these two competing interests, the Court at least professed to err on the side of free speech to allow for speech to have the “breathing space” needed to avoid the chilling effect identified in *New York Times*.<sup>43</sup> Nevertheless, the Court still recognized that some speech is beyond the pale, and that certain forms of insults that injure another could subject the speaker to civil or criminal liability.

## II. Defamation in the United States Today

In the American civil context, defamation is a frequently used cause of action, and various commentators have noted that the United States’ contemporary tense and polarized political environment has ushered in a “golden age” of defamation.<sup>44</sup> High-profile cases occupy the headlines of the United States’ most esteemed media institutions.<sup>45</sup> Recently, such cases include the parents of the Sandy Hook victims bringing a defamation cause of action Alex Jones for statements regarding the Sandy Hook school shooting and U.S. Dominion bringing an action against MyPillow for defamatory statements by MyPillow CEO Mike Lindell about the integrity of U.S. Dominion’s voting machines.<sup>46</sup>

<sup>38</sup>See *id.*

<sup>39</sup>*New York Times Co.*, 376 U.S. at 293; see also *Garrison*, 379 U.S. at 79.

<sup>40</sup>See *New York Times Co.*, 376 U.S. at 293; *Garrison*, 379 U.S. at 79.

<sup>41</sup>See *New York Times Co.*, 376 U.S. at 293; *Garrison*, 379 U.S. at 79.

<sup>42</sup>*Gertz*, 418 U.S. at 341.

<sup>43</sup>*Id.*; see also *New York Times Co.*, 376 U.S. at 280.

<sup>44</sup>See, e.g., Bo Pearl, Avery Johnson, & Kiaura Clark, *The Golden Age of Defamation*, LAW.COM (Mar. 12, 2021), <https://www.law.com/2021/03/12/golden-age-of-defamation/>.

<sup>45</sup>See, e.g., Reis Thebault, *Alex Jones Must Pay Damages to Sandy Hook Families in Another Defamation Case, Judge Rules*, WASH. POST (Nov. 15, 2021), <https://www.npr.org/2022/10/20/1130131679/donald-trump-deposed-in-defamation-suit-filed-by-e-jean-carroll>; Sapna Maheshwari & Lauren Hish, *MyPillow C.E.O. Mike Lindell Sued by Dominion Over Election Fraud Claims*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/02/22/business/mike-lindell-mypillow-election-fraud-suit.html>. See also, *Donald Trump Deposed in Defamation Suit Filed by E. Jean Carroll*, NAT’L PUB. RADIO (Oct. 20, 2022), <https://www.npr.org/2022/10/20/1130131679/donald-trump-deposed-in-defamation-suit-filed-by-e-jean-carroll> (covering the case of Journalist E. Jean Carroll versus Donald Trump for calling Carroll a “hoax and a lie”).

<sup>46</sup>See Thebault, *supra* note 45; Maheshwari & Hish, *supra* note 45.

In the criminal context, prosecution of defamation has been sparse and in decline since the beginning of the 20<sup>th</sup> century.<sup>47</sup> Even in *Garrison* in 1964, Justice Brennan’s majority opinion mentions that civil remedies for defamation may have resulted in the “paucity of prosecutions” of criminal defamation in the United States at the time.<sup>48</sup> While twenty-five states maintain criminal defamation law, six states have repealed their respective criminal defamation statutes within the past fifteen years.<sup>49</sup> Still, prosecutions are carried out under these laws, and scholars have found that prosecution rates have increased with the proliferation of online speech.<sup>50</sup> For instance, a study found twenty-one criminal defamation prosecutions in Wisconsin between 1991 and 1998, a period that predated the widespread use of the internet.<sup>51</sup> However, between 1999 and 2007, a period with more widespread internet use, there were forty criminal defamation prosecutions in Wisconsin, nineteen of which centered on online speech.<sup>52</sup> Thus, the rate of prosecutions essentially doubled, yet still increased from only roughly 2.5 to five percent per year in a state with a population of five million residents.<sup>53</sup> In the few instances where criminal defamation charges are brought, a disproportionate number of charges involve speech directed at public officials or public issues more generally.<sup>54</sup> For the 1991 to 1998 period in Wisconsin, roughly forty percent of those involved speech directed at elected public officials or government employees.<sup>55</sup> Another study looking at a sampling of criminal defamation cases in various states concluded that for the period between 1990 and 2002, roughly ninety percent of all cases involved public issues of some sort.<sup>56</sup>

In sum, despite the rollback of state criminal defamation laws, civil litigants and state prosecutors have taken advantage of the contours provided by First Amendment jurisprudence. In striking a balance between the state’s interest in maintaining an individual’s reputation and the interest in free, open, and robust debate, the Supreme Court left space for private plaintiffs and prosecutors to seek compensation or punishment for false speech that injures the reputation of another. Thus, the First Amendment has not totally shut the door on regulating speech, even speech critical of public officials or speech related to public matters.

## C. Thai Law

### 1. Thailand, the Monarchy, and Section 112 of the Thai Criminal Code

The Kingdom of Thailand is a constitutional monarchy with a parliamentary system of government and the King as the head of state.<sup>57</sup> Reverence for the monarchy is at the heart of Thai culture.<sup>58</sup> While purely ceremonial, due to his esteem and legitimacy within Thailand, the

<sup>47</sup>See Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POLY 433, 466 (2004); Robert Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984, 985 (1956).

<sup>48</sup>*Garrison*, 379 U.S. at 70.

<sup>49</sup>See ACLU, *supra* note 24 (describing the states that have repealed their criminal defamation statutes including Arkansas, Colorado, Georgia, Maryland, Rhode Island, and Washington).

<sup>50</sup>See, e.g., David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. L. & POLY 303, 316–17 (2009); Edward I. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media & Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUT. & HIGH TECH. LJ 289, 298 (2005).

<sup>51</sup>See Pritchard, *supra* note 50.

<sup>52</sup>See *id.* at 316–17.

<sup>53</sup>See *id.*

<sup>54</sup>See *id.*

<sup>55</sup>See *id.*

<sup>56</sup>See *Frese v. State of New Hampshire*, ACLU NEW HAMPSHIRE, <https://www.aclu-nh.org/en/cases/frese-vs-state-new-hampshire> (last visited on Feb. 20, 2024).

<sup>57</sup>See CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2560 (2017), Preamble.

<sup>58</sup>See, e.g., *Thailand’s King Vajiralongkorn Crowned as Divine Monarch*, AL JAZEERA (May 4, 2019), <https://www.aljazeera.com/news/2019/5/4/thailands-king-vajiralongkorn-crowned-as-divine-monarch>.



King has considerable influence over all parts of Thai society, including politics.<sup>59</sup> Thailand's Criminal Code Section 112 establishes the Kingdom's lèse-majesté law.<sup>60</sup> It states, "whoever defames, insults, or threatens the King, shall be punished with imprisonment of three to fifteen years."<sup>61</sup> Thailand is one of the few modern countries that strictly enforces such a law.<sup>62</sup>

The current law has its roots in the crime of treason due to the King's historical role as an absolute monarch prior to 1932.<sup>63</sup> One scholar described the relationship between the insulting remarks towards the King and treason stating, "Any act against the King is viewed as rebellion, lèse-majesté, treason. As the King and state were perfectly identified with each other, all offenses against the state were offenses against the King and vice versa."<sup>64</sup> Around the turn of the 20<sup>th</sup> century, Thai political philosophy began to recognize the King and the state as distinct entities.<sup>65</sup> Thailand's first modern criminal code reflected that distinction.<sup>66</sup> As opposed to classifying defamation of the King or royal family as rebellion, Section 98 of the 1908 code independently protected the King from defamation and displays of malice.<sup>67</sup>

The revision of the Thai criminal code in 1956, which established the lèse-majesté law in force today, strengthened the lèse-majesté law in three significant ways.<sup>68</sup> First, with the 1956 revision, the criminal code adopted the current Section 112: "Whosoever defames, insults or threatens the King, the Queen, the Heir-apparent, or the Regent shall be punished with imprisonment not exceeding seven years."<sup>69</sup> This iteration of the law crucially added "insults" to the list of offenses.<sup>70</sup> Second, the revised criminal code classified the offense as a national security crime, allowing for more involvement in the prosecution of these crimes by the Thai military, military-dominated governments, and the broader Thai population.<sup>71</sup> In most jurisdictions, usually only the victim of a defamatory statement can file a criminal complaint.<sup>72</sup> By classifying Section 112 as a national security matter, any individual can file a complaint, or the government can pursue prosecution without a complaint.<sup>73</sup> Finally, the 1956 code revision repealed certain protections for speech directed at the monarchy that were enacted following the Thailand's imposition of constitutional monarchy in following the Siamese evolution of 1932.<sup>74</sup> At this time, the new Thai constitutional government added an exclusion clause to then existing lèse-majesté law protecting good faith expressions and unbiased comments about the government and monarchy "within the spirit of the Constitution or for the public interest."<sup>75</sup> In theory, this exclusion allowed for greater

<sup>59</sup>See, e.g., Pavin Chanchavalpongpun, *A King Above and Beyond Politics*, N.Y. TIMES (Dec. 5, 2020), <https://www.nytimes.com/2020/12/05/opinion/thailand-king-protests.html>.

<sup>60</sup>See Criminal Code B.E. 2499 (1956), s.112, *supra* note 8; see Hannah Beech & Mukitata Suhartono, *A Feared Law to Protect the Monarchy Returns Amid Thailand Protests*, N.Y. TIMES (Jan. 19, 2021), <https://www.nytimes.com/2020/11/25/world/asia/thailand-protest-lese-majeste-monarchy.html>.

<sup>61</sup>See Criminal Code B.E. 2499 (1956), s.112, *supra* note 8.

<sup>62</sup>See Baber, *supra* note 17, at 693.

<sup>63</sup>See Streckfuss, *supra* note 10, at 468.

<sup>64</sup>*Id.*

<sup>65</sup>See *id.*

<sup>66</sup>See Somchai Preechasilpakul & David Streckfuss, *Ramifications and Re-Sacralization of the Lese Majesty Law in Thailand*, Paper Presented at 10th International Conference on Thai Studies, 3 (2008), <https://www.law.cmu.ac.th/law2011/journal/20682.pdf>.

<sup>67</sup>See *id.*

<sup>68</sup>See *id.*

<sup>69</sup>*Id.*; Criminal Code B.E. 2499 (1956), s.112, *supra* note 8.

<sup>70</sup>See Baber, *supra* note 17, at 698; see also Streckfuss, *supra* note 10, at 453–54.

<sup>71</sup>See Baber, *supra* note 17.

<sup>72</sup>See *id.*; Mesenbet Assefa Tadeg, *Making Space for Non-Liberal Constitutionalism in Free Speech: Lessons from a Comparative Study of the State of Free Speech in Ethiopia and Thailand*, 30 J. OF ETH. LAW 4, 14 (2019).

<sup>73</sup>Mesenbet, *supra* note 72, at 14.

<sup>74</sup>See Somchai & Streckfuss, *supra* note 66, at 6.

<sup>75</sup>*Id.*

protections for speech directed at the monarchy, nonetheless, the 1956 revisions dropped the exclusion clause.<sup>76</sup>

As of today, Thailand's lèse-majesté law is perhaps the strictest and most stringently enforced law of its kind in the world.<sup>77</sup> With its ban of insults, the current law distinguishes itself from most criminal defamation laws through its disregard for the truth of the statement.<sup>78</sup> David Streckfuss, an American scholar of the Thai monarchy, posits that disregard for the truth turns the lèse-majesté law into a "discursive law" measured and enforced by its effect.<sup>79</sup> Explaining this dynamic, he writes, "In lèse-majesté cases, however, it is not necessary to substantiate the truth, for the truth of what was said is not at issue. Ascertaining guilt remains at the level of its hypothetical impact, determined by the projected effect the words . . . would have on listeners."<sup>80</sup>

In the rare instance of a documented derogatory statement, the effect of the statement is clear: Degrading the monarchy.<sup>81</sup> Such instances lead to straightforward prosecution and conviction.<sup>82</sup> For instance, in October 2020, a Thai citizen named Jutaporn Saeoung mocked the Queen of Thailand by dressing up as her in a characterized fashion at a red carpet-themed protest in Bangkok.<sup>83</sup> A Bangkok court found Jutaporn guilty in September of 2022.<sup>84</sup> Due to the law's chilling effect, such derogatory statements are rare.<sup>85</sup>

More commonly, Thai authorities punish more benign statements that incidentally effect the crown. The case of Wanchaleom Jamneanphol serves as a modern illustrative example.<sup>86</sup> In 2018, the popular Thai social media personality faced charges for describing a dress designed by the Royal Princess and worn by a Miss Universe Thailand representative as ugly.<sup>87</sup> In a statement to the Princess, Wanchaleom wrote that she "did not have any intention to insult or disrespect the high institution . . . I feel deeply guilty and sorry for what had happened."<sup>88</sup> Wanchaleom ultimately was acquitted, but the incident gained considerable media attention.<sup>89</sup> Other prominent examples of charges stemming from seemingly benign statements that incidentally degrade the monarchy include questioning the historical validity of an elephant duel between rival monarchs in the sixteenth century and criticizing the institution of slavery during the reign of King Mangkut (1851–68).<sup>90</sup>

<sup>76</sup>See *id.* at 5.

<sup>77</sup>See, e.g., NuDelman, *supra* note 17; Beech & Suhartono, *supra* note 60.

<sup>78</sup>See Streckfuss, *supra* note 10, at 453.

<sup>79</sup>See *id.*

<sup>80</sup>See *id.* at 453–56; see also Jonathan Head, *Defaming a Dog: The Ways to Get Arrested for Lese-majeste in Thailand*, BBC (Dec. 16, 2015), <https://www.bbc.com/news/world-asia-35099322>.

<sup>81</sup>See *id.*

<sup>82</sup>See *id.*

<sup>83</sup>Jutaporn will soon receive a sentence. See Sebastian Strangio, *Thai Political Activist Jailed for Mocking, Impersonating Queen*, THE DIPLOMAT (Sept. 14, 2022), <https://thediplomat.com/2022/09/thai-political-activist-jailed-for-mocking-impersonating-queen/>; see also Panu Wongcha-um & Patpicha Tanakaspempipat, *Thai Exiles in Fear After Murders and Disappearances*, REUTERS (May 24, 2019), <https://www.reuters.com/article/us-thailand-rights-exiles-insight-idUSKCN1SU0DV/> detailing the case of Nithiwat Wannasiri).

<sup>84</sup>See *id.*

<sup>85</sup>See *id.*

<sup>86</sup>For instance, in 2018 a popular Thai Youtube personality faced charges for criticizing a dress worn by a Miss Universe Thailand contestant that was designed by the daughter of the Thai King. See Hannah Ellis-Petersen, *YouTube Host Faces Charges for Criticizing Thai Princess's Miss Universe Dress*, GUARDIAN (Dec. 19, 2018), <https://www.theguardian.com/world/2018/dec/19/youtube-host-faces-charges-for-criticising-thai-princess-miss-universe-dress>; Streckfuss, *supra* note 10, at 449; Baber, *supra* note 17 at 697–98.

<sup>87</sup>See Ellis-Petersen, *supra* note 86.

<sup>88</sup>See *YouTuber Faces Charges for Mocking Thai Princess's 'Ugly' Miss Universe Gown*, THE SYDNEY MORNING HERALD (Dec. 20, 2018), <https://www.smh.com.au/world/asia/youtuber-faces-charges-for-mocking-thai-princess-ugly-miss-universe-gown-20181220-p50nbf.html>.

<sup>89</sup>See *id.*

<sup>90</sup>See Head, *supra* note 80; *Lese Majeste Claims Over Naresuan Elephant Duel*, BANGKOK POST (Oct. 19, 2014), <https://www.bangkokpost.com/thailand/general/438339/lese-majeste-claims-over-naresuan-elephant-duel>.



Thus, regardless of the truth of the matter asserted, the lèse-majesté law can criminalize derogatory statements about the monarchy as well as seemingly benign statements that incidentally criticize the monarchy.

## II. Lèse-Majesté Today

Thailand stands above the rest of the world in terms of its enforcement of its lèse-majesté law.<sup>91</sup> The U.S. Department of State Overseas Security Advisory Council lists thirteen countries with lèse-majesté laws.<sup>92</sup> Of the 13 countries with formal lèse-majesté laws, six are in Europe—Belgium, Denmark, Sweden, Spain, Netherlands, and Monaco—and do not actively enforce their respective laws.<sup>93</sup> Of the remaining seven, Thailand law is uniquely pervasive.

Thai citizens face lèse-majesté threats from every angle in the Thai criminal justice system. While the data is somewhat incomplete, since the 2014 coup, indictments, conviction rates and sentence length have all increased dramatically. According to statistics from the Thai Attorney General's Office, from 1957 to 2014, the Thai government conducted around ten or fewer prosecutions per year.<sup>94</sup> Following the military coup in 2014, however, prosecutions jumped.<sup>95</sup> Between May 2014 and July 2017, at least 127 people were arrested, and at least fifty-seven were imprisoned for violations of Section 112.<sup>96</sup>

For a few years following the 2014 coup, enforcement of the law began to wane as the new military-dominated government solidified its power. In 2018, the Attorney General of Thailand issued new guidelines requiring prosecutors to review potential section 112 cases with the Attorney General's office.<sup>97</sup> This change in internal policy reduced the number of lèse-majesté cases brought to near zero.<sup>98</sup> The government, however, resumed enforcement of the law during the student protests of 2020–2021.<sup>99</sup> On one day alone during the protests, Thai authorities arrested twelve protestors on charges pursuant to Section 112.<sup>100</sup>

Compounding the increased prosecution rate, in 2016, the junta-appointed parliament unanimously adopted amendments to the 2007 Computer-Related Crime Act, which strengthened the government's ability to enforce Section 112 with respect to speech on the internet.<sup>101</sup> Under the law, simply "liking" an anti-royalist Facebook post could warrant prosecution or deletion.<sup>102</sup> The United States Agency for International Development has posited that the junta government has used the new law to promote a more royalist and nationalist online

<sup>91</sup>See NuDelman, *supra* note 17, at 14.

<sup>92</sup>See OSAC, *Lèse Majeste: Watching What You Say (and Type) Abroad*, <https://www.osac.gov/Content/Report/e48a9599-9258-483c-9cd4-169f9c8946f5> (last visited November 3, 2022) (listing Thailand, Malaysia Cambodia, Jordan, Kuwait, Bahrain, Saudi Arabia, and six European countries as legal systems with a lèse-majesté law).

<sup>93</sup>See *id.*

<sup>94</sup>See Preechasilpakul & Streckfuss, *supra* note 66, at 17.

<sup>95</sup>See, e.g., *Number of Post-coups Lese-majeste Arrests Surges to Over 100*, INT'L FED'N FOR HUM. RTS. (Aug. 5, 2017), <https://www.fidh.org/en/region/asia/thailand/number-of-post-coup-lese-majeste-arrests-surges-to-over-100>; *Thailand's Junta Intensifies its Hunt for Critics of the Monarchy*, ECONOMIST (May 18, 2017), <https://www.economist.com/asia/2017/05/18/thailands-junta-intensifies-its-hunt-for-critics-of-the-monarchy>.

<sup>96</sup>See INT'L FED'N FOR HUM. RTS., *supra* note 95.

<sup>97</sup>See, e.g., *Changes in Thailand's Lese Majeste Prosecutions in 2018*, THAI LAWYERS FOR HUMAN RIGHTS (Jan. 15, 2018), <https://tlhr2014.com/en/archives/10431?lang=en>.

<sup>98</sup>See *id.*

<sup>99</sup>See Beech & Muktitia, *supra* note 60.

<sup>100</sup>See *id.*

<sup>101</sup>See Patpicha Tanakesmpipat, *Thailand Passes Internet Security Law Decried as 'Cyber Martial Law'*, REUTERS (Feb. 28, 2019), <https://www.reuters.com/article/us-thailand-cyber/thailand-passes-internet-security-law-decried-as-cyber-martial-law-idUSKCN1QH1OB/>.

<sup>102</sup>See NuDelman, *supra* note 17, at 15.

atmosphere.<sup>103</sup> Making this point, the Agency reports, “Official campaigns to manipulate online information base their narrative primarily on royal nationalism. To be Thai is to be a subject, rather than a citizen, of the kingdom.”<sup>104</sup>

In addition to the increase in prosecution rates and more online enforcement, conviction rates and sentence have increased under the junta government.<sup>105</sup> According to the United Nations Office of the High Commissioner for Human Rights, the conviction rate jumped from roughly 76% in 2011–13 (pre-junta) to 96% in 2016.<sup>106</sup> Further still, the regime has handed down more severe sentences for violations of the law. For example, in 2017, the junta regime sentenced an offender to thirty-five years—the longest sentence at its time.<sup>107</sup> Following the enforcement hiatus, in 2021 the junta returned to course and sentenced a former civil servant to more than forty-three years—the current longest sentence for violation of the law.<sup>108</sup>

In sum, Thailand criminally punishes and prohibits a broad range of speech related to its sovereign monarch and the royal family. In comparison to other countries, Thailand is more robust in enforcing its *lèse-majesté* law, especially with the passage of the Computer Crimes Act and the rise of the junta government. Still, for a roughly two-year period from 2018 to 2020, the government effectively stopped enforcing the Section 112. Moreover, from the period of 1932 to the revision of the Thai criminal code in 1957, Thai citizens could discuss and criticize the monarchy so long as they did so in the spirit of the Thai constitution.

## D. Comparative Analysis

### I. Similarity and Variation

In terms of substance and enforcement, Thailand’s *lèse-majesté* law and the United States’ defamation law regimes come with significant differences. Most obviously the Thai *lèse-majesté* law prohibits a broader range of speech directed at the Thai Monarchy compared to the amount of speech that United States defamation laws prohibit against all individuals. Further, due to *New York Times* and its progeny, public official and public figure-based civil and criminal defamation claims in the U.S. require that speaker acted with “malice.” In contrast, Thailand’s *lèse-majesté* law is “discursive” and focuses only on whether the speech in question degraded or insulted the monarchy. In the criminal context, Thai state actors prosecute violations of Section 112 more actively and with harsher consequences than their U.S. counterparts.

At the same time, the two legal regimes show similarity. In the words of Justice Powell in his majority opinion in *Gertz*, both legal regimes attempt to find “the proper accommodation between competing values,” and the competing values in both countries are quite similar.<sup>109</sup> In the U.S. regime, the principal competing value in favor of opening up speech, among others, is the state’s interest in “vigorous and uninhibited” speech particularly as for matters of public concern.<sup>110</sup> Alternately, the competing value in favor of restricting speech is “the legitimate state interest in

<sup>103</sup>See Michael Buehler et al., *How Information Disorder Affirms Authoritarianism and Destabilizes Democracy: Evidence, Trends and Actionable Mitigation Strategies From Asia and the Pacific* 76–77 (USAID 2021), [https://pdf.usaid.gov/pdf\\_docs/PA00Z3JC.pdf](https://pdf.usaid.gov/pdf_docs/PA00Z3JC.pdf).

<sup>104</sup>*Id.* at 76.

<sup>105</sup>See Nudelman, *supra* note 17, at 19; *Press Briefing Note on Thailand*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Jun. 13, 2017), <https://www.ohchr.org/en/2017/06/press-briefing-note-thailand>.

<sup>106</sup>See Nudelman, *supra* note 17, at 19; *Press Briefing Note on Thailand*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Jun. 13, 2017), <https://www.ohchr.org/en/2017/06/press-briefing-note-thailand>.

<sup>107</sup>See *U.N. Rights Body Voices Concern About Jump in Lese Majeste Prosecutions and Long Jail Terms for Offend* [sic], NATION (Thailand) (Jun. 13, 2017), <https://www.nationthailand.com/news/30318002>; *Longest Prison Sentence Ever for Lese Majeste*, BANGKOK POST (June 9, 2017), <https://www.bangkokpost.com/thailand/general/1265778/longest-prison-sentence-ever-for-lese-majeste>.

<sup>108</sup>See Beech, *supra* note 12.

<sup>109</sup>*Getz*, 418 U.S. at 341.

<sup>110</sup>*Id.*

redressing wrongful injury” to reputation.<sup>111</sup> Similarly, the Thai regime certainly recognizes the value of speech about the monarchy. This was most obviously the case with the exclusion clause that was in effect from 1932 to 1957, which allowed for speech critical of the monarchy so long as it was “within the spirit of the Constitution of the public interest.”<sup>112</sup> Even after 1957, the Thai regime has not prohibited praiseworthy or neutral speech about the monarchy, and various Thai constitutions, including the current one, recognized some sort of right to free speech.<sup>113</sup> On the other end of the spectrum, the competing value within the Thai regime in favor of restricting speech is the state’s interest in redressing injuries to the monarchy’s reputation. Thus, both regimes recognize and accommodate the competing objectives of allowing for free and robust discussion and allowing for the state to punish or impose liability for injuries to reputation.

Relative to one another, when striking a balance between interests that call for expanding and restricting speech, the U.S. legal regime allows for greater speech, and the Thai legal regime allows for more restrictions on speech and strictly enforces those restrictions. The histories, political philosophies, and religiosities of the two countries can explain how the two regimes struck their respective balances.

## E. Explaining Variation

### I. United States and Liberal Constitutionalism

The United States’ comparatively permissive restrictions on defamatory speech draw from the United States’ commitment to democratic constitutionalism—a concept of referring to the practice that government should embody the will of the citizenry and that the Constitution should facilitate that goal.<sup>114</sup>

Even before the drafting of the Constitution in 1787, the framers endorsed democratic beliefs that colored the political philosophy of the early American republic.<sup>115</sup> This impulse was most profoundly articulated in the Declaration of Independence.<sup>116</sup> The Declaration’s most seminal and oft-quoted phrase recognizes that the just exercise of government power stems from the will of the citizenry: “We hold these truths to be self-evident . . . Life, Liberty and the pursuit of Happiness—That to secure these rights, Government are instituted among Men, deriving their just powers from the consent of the governed.”<sup>117</sup> This impulse stems from, among others, the influence of the social compact theory of John Locke.<sup>118</sup>

In crafting the Constitution, the framers integrated various democratic processes into the governing charter, such as directly elected members of the House of Representatives, the indirectly elected President, and the appointment of Senators by elected state legislatures.<sup>119</sup> Throughout the

<sup>111</sup>*Id.*

<sup>112</sup>Preechasilpakul & Streckfuss, *supra* note 66, at 4.

<sup>113</sup>*See id.*; CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2560 (2017), § 34.

<sup>114</sup>Legal theorist Joseph Raz identified seven characteristics of “constitutionalism” above and beyond a country possessing and adhering to a governing charter. They include that: (1) The charter establishes and defines the society’s governing powers and organs; (2) the charter is meant to operate for a long time, providing an enduring and stable framework for law and governance; (3) the charter is often written as a canonical text; (4) the charter articulates superior law that must render conflicting ‘ordinary law’ inapplicable; (5) the charter’s regime is subject to review by the judiciary; (6) the charter is difficult to amend; and (7) the charter expresses or reinforces the identity and values of the society it governs. *See* JOSEPH RAZ, AUTHORITY AND INTERPRETATION 324–25 (2009). *See also*, ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION 91–97 (2003).

<sup>115</sup>*See* Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2008 SUP. CT. REV. 293, 296–98 (2008); David M. Rabban, 90 YALE L.J. 514, 570–71 (1981) Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?* 111 PENN ST. L. REV. 413, 414–17 (2006).

<sup>116</sup>*See* Strang, *supra* note 115, at 415–16.

<sup>117</sup>THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776).

<sup>118</sup>*See* Werhan, *supra* note 115, at 341–42.

<sup>119</sup>*See* U.S. CONST. art. I § 2; U.S. CONST. art. I § 3, U.S. CONST., art. II § 1.

later nineteenth and twentieth centuries, Americans altered the Constitution in numerous ways to produce an increasingly democratic charter. Chief among these include the Civil War amendments, the Seventeenth Amendment, which established the direct election of United States Senators, the Nineteenth Amendment, which granted the franchise to women, and the Twenty-sixth Amendment, which lowered the voting age to eighteen.<sup>120</sup> Congruently, United State legislatures passed various laws expanding the franchise, such as the Voting Rights Act of 1965.<sup>121</sup> To be sure, various perniciously undemocratic elements continue to fester within the Constitution. For instance, the Constitution's allotment of two Senators to each U.S. grants voters in sparsely populated, usually rural, states disproportionately outsized representation in the Senate.<sup>122</sup> This disparity leads to one voter in Wyoming—the least populated state—having the voting power of fifty-nine voters in California—the most populated state.<sup>123</sup> Similarly, the intricacies of the Electoral College give disproportionate weight to small states and competitive “swing states,” so much so that in both the 2000 and 2016 elections, the winner of the national popular vote lost the Electoral College.<sup>124</sup>

U.S. legal scholars and jurists, particularly since the beginning of the twentieth century, have recognized the connection between protecting freedom of speech and democratic government.<sup>125</sup> Free and open discussion should allow citizens to come to their own views, which citizens can use at the ballot box to elect representatives that will serve the citizens' interests. If the government could censor speech, it could suppress speech antithetical to its own objectives. Citizens would then have access only to government-approved speech to serve as the bases of their decisions at the ballot box. At that point, the government could effectively steer the electoral process toward its own preferences. By avoiding this outcome, freedom of speech helps to facilitate government for the sake of the governed as opposed to government for the sake of the government.<sup>126</sup> The connection between free speech and democracy has its intellectual roots in the American legal scholar and philosopher Alexander Meiklejohn, who proliferated such views in the early part of the twentieth century.<sup>127</sup> More recently, legal scholars from Robert Bork to Cass Sunstein have recognized this connection between free speech and the democratic process.<sup>128</sup>

Over the twentieth century, the Supreme Court's First Amendment jurisprudence integrated the connection between free speech and democratic constitutionalism. This began with a series of cases involving the Espionage Act of 1917, in which the Court expanded the scope of the First Amendment to protect speech so long as it does not provide a “clear and present danger” in addition to its traditional role of forbidding prior restraints.<sup>129</sup> In the seminal *West Virginia State*

<sup>120</sup>See U.S. CONST. amend XII; U.S. CONST. amend XIV; U.S. CONST. amend XV; U.S. CONST. amend XVII; U.S. CONST. amend XXVI.

<sup>121</sup>See 52 U.S.C.A. § 10301 (colloquially referred to as the Voting Rights Act of 1965).

<sup>122</sup>See, e.g., *What's Going on in This Graph? Senate Representation by State*, N.Y. TIMES (Oct. 7, 2022), <https://www.nytimes.com/2022/10/27/learning/whats-going-on-in-this-graph-nov-9-2022.html>.

<sup>123</sup>See *id.*

<sup>124</sup>See Jerry Schwartz, *EXPLAINER: They Lost the Popular Vote But Won Elections*, ASSOC. PRESS (Oct. 21, 2020), <https://apnews.com/article/ap-explains-elections-popular-vote-743f5cb6c70fce9489c9926a907855eb>; see also Wilfred U. Codrington III, *The Electoral College's Racist Origins*, BRENNAN CTR. FOR JUST. (Apr. 1, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/electoral-colleges-racist-origins>. But see Allen Guelzo, *In Defense of the Electoral College*, NAT'L AFFS. (Winter 2018), <https://www.nationalaffairs.com/publications/detail/in-defense-of-the-electoral-college>.

<sup>125</sup>See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961); SUNSTEIN, *supra* note 1, at 121–65; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–21 (1971).

<sup>126</sup>See, e.g., SUNSTEIN, *supra* note 1, at 121–6; BORK, *supra* note 125, at 20–21.

<sup>127</sup>See *id.*; see also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 83 (Harper & Bros. 1965); Bhagwat, *supra* note 1.

<sup>128</sup>See SUNSTEIN, *supra* note 1, at 121–65; BORK, *supra* note 125, at 61.

<sup>129</sup>*Schenck v. United States*, 249 U.S. 4, 48–49 (1919) (“[I]t well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose.”).

*Board of Education v. Barnette* case, the Supreme Court struck down a West Virginia regulation requiring a compulsory flag salute for public school children. In doing so, Justice Jackson recognized that “If there is any fixed star in our constitutional constellation, it is that no official, high or pretty can prescribe what shall be orthodox in politics, nationalism, religion.”<sup>130</sup> Thus, Jackson’s opinion endorses the principles that, one, citizens, and not the government, get to select the orthodoxy and priorities of government, and two, less regulation of speech is instrumental in achieving that end.<sup>131</sup>

In principal case that setting forth parameters of defamation to this day—*New York Times Co. v. Sullivan*—the Supreme Court drew from these principles in all three of the Court’s opinions.<sup>132</sup> In his majority opinion, Justice Brennan eloquently recognized that free speech is essential to democratic governance when quoting the Court’s previous decision in *Stromberg v. California*: “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system.”<sup>133</sup> Similarly, Justice Black’s concurrence stated: “A representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions on any public measure.”<sup>134</sup>

Finally, Justice Goldberg recognized that “the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, certain liberties [including speech] are in the long view essential . . . of the citizens of a democracy.”<sup>135</sup>

In juxtaposition with the Court’s appreciation for the role free speech plays in democratic constitutionalism, the Supreme Court’s First Amendment jurisprudence recognized essential realities of human behavior, specifically that “erroneous statement is inevitable in free debate.”<sup>136</sup> Thus, to ensure free debate, which ensures democratic government, erroneous statements must be protected in civil and criminal contexts.<sup>137</sup> As mentioned in Section I, the Supreme Court’s jurisprudence in this area of law has remained intact to this day, and the Court has continued to reaffirm the integral role free speech plays in the democratic process.<sup>138</sup>

For these reasons, the United States’ commitment to democratic constitutionalism shifted U.S. law to favor providing for greater speech instead of providing more opportunities to compensate for injuries to reputation. However, this was not truly the case until the U.S. legal system began to recognize the connection between democratic constitutionalism and free speech during the beginning of the 20<sup>th</sup> century due to thinkers like Meiklejohn and jurists like Brandies.<sup>139</sup> The main Supreme Court rulings that establish a narrower window for defamation did not take place until the 1960s and 1970s with *New York Times*, *Garrison*, *Gertz*, etc. Thus, the United States has a comparatively narrower area of speech that is susceptible to civil or criminal liability results from the historical and philosophical processes that influenced the U.S. legal system over time.

<sup>130</sup>See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>131</sup>See *id.*; see also Bhagwat, *supra* note 1, at 61.

<sup>132</sup>See *New York Times Co.*, 376 U.S. at 269.

<sup>133</sup>*Id.*

<sup>134</sup>*Id.* at 297.

<sup>135</sup>*Id.* at 305.

<sup>136</sup>*Id.* at 271.

<sup>137</sup>See *id.* at 272; *Garrison* 379 U.S. at 216 (both stating that “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”).

<sup>138</sup>See *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 202–03 (2014); *Snyder* 562 U.S. at 451–52.

<sup>139</sup>See, e.g., *Whitney*, 274 U.S. at 372–7; Meiklejohn, *supra* note 125, at 255.

## II. The Monarchy in History: “Thais loved Bhumibol because he was their King, now Thailand loved their King because he was Bhumibol”

Thailand’s more expansive and more targeted restrictions on speech derive from the reverence and esteem Thailand places on its monarchy and its adherence to various Buddhist principles. To the Western observer, the level of reverence for the monarchy cannot be overstated.<sup>140</sup> This esteem for the monarchy stems in many ways from the critical role it played in response to two of the most important transformative events in Thai history—the sacking of Ayutthaya during the Burmese–Siamese War and the Siamese revolution of 1932.

The Chakri dynasty has ruled over various iterations of the nation-state since 1782 and solidified its legitimacy following the sack of Ayutthaya in the Burmese–Siamese War.<sup>141</sup> The sack of Ayutthaya, the former Thai capital, by the Burmese army and the movement of the capital to Bangkok, placed the Kingdom of Siam in disarray.<sup>142</sup> One scholar described the sack of Ayutthaya not just as a “physical destruction” but “a psychologically traumatic experience for a largely traditional society” akin to a “nihilistic destruction of their civilization.”<sup>143</sup> Following the sack, the first three kings of the Chakri Dynasty, Rama I, reigning from 1782–1809, Rama II, 1809–24, and Rama III, 1824–51, revitalized Thailand by introducing comprehensive civil legal codes, opening up the country to trade with foreign nations, and restoring administrative functions and social hierarchies.<sup>144</sup>

The Siamese revolution of 1932 instituted modern Thailand, and again, the monarchy emerged stronger in its aftermath.<sup>145</sup> Spurred by dissatisfaction with absolute monarchy along with the global reverberations of the Great Depression begun in the United States, the Thai military marched on Bangkok on June 24, 1932.<sup>146</sup> Recognizing the centrality of the monarchy to the Thai identity, the Revolution did not result in the abolition of the monarchy but rather the establishment of a constitutional monarchy with the King as the head of state.<sup>147</sup> Complementing the monarch, the Constitution of 1932 instituted a “People’s Committee” as an executive branch and an “Assembly of People’s Representatives” as a legislature.<sup>148</sup> At this time, anti-monarchical sentiment was at its zenith in Thailand, which helps to explain the exclusion clause and, in turn, the weaker *lèse-majesté* law from 1932 to 1957.

Still, fourteen years after the beginning of the monarchy’s new limited rule, King Bhumibol Adulyadej, or Rama IX, assumed the throne and brought the monarchy to new levels of reverence during his over seventy-year reign.<sup>149</sup> In the opening preface of his acclaimed biography of King Rama IX, Paul Handley recounts that “nearly every Thai one meets expresses unquestioning praise for the king.”<sup>150</sup> Moreover, *Al Jazeera* described King Bhumibol as “long revered by Thais as

<sup>140</sup>See, e.g., M.R. Sukhumbhand Paribatra, *Some Reflections on the Thai Monarchy*, SE. ASIAN AFFS., 2003, at 291–92; Joshua Kurlantzick, *The Mixed Legacy of King Bhumibol Adulyadej*, COUNCIL ON FOREIGN RELATIONS (Oct. 13, 2016), <https://www.cfr.org/expert-brief/mixed-legacy-king-bhumibol-adulyadej>; Richard Bernstein, *Thailand’s Playboy King Isn’t Playing Around*, VOX (Jan. 24, 2020), <https://www.vox.com/2020/1/24/21075149/king-thailand-maha-vajiralongkorn-facebook-video-tattoos>.

<sup>141</sup>See Paribatra, *supra* note 140, at 292–93.

<sup>142</sup>See *id.*

<sup>143</sup>*Id.* at 293.

<sup>144</sup>See Paribatra, *supra* note 140, at 293; see also CHRIS BAKER & PASUK PHONGPAICHT, *A HISTORY OF THAILAND*, 25–36 (2014).

<sup>145</sup>See Paribatra, *supra* note 140, at 293; see also Saad M. Hasmi, *1932 Revolution in Thailand*, 18 INDIA Q. 254, 254–68 (1962).

<sup>146</sup>See Hasmi, *supra* note 145, at 254–68; BAKER & PHONGPAICHT, *supra* note 144, at 104–39.

<sup>147</sup>See Hasmi, *supra* note 145, at 254–68; BAKER & PHONGPAICHT, *supra* note 144, at 104–39.

<sup>148</sup>See JUDITH A. STOWE, *SIAM BECOMES THAILAND: A STORY OF INTRIGUE* 12 (1991).

<sup>149</sup>See PAUL HANDLEY, *THE KING NEVER SMILES: A BIOGRAPHY OF THAILAND’S BHUMIBOL ADULYADEJ* 2–10 (2006).

<sup>150</sup>See *id.* at ix.



god-like.”<sup>151</sup> Following his passing in 2016, almost twelve million people, or around one–sixth of Thailand’s population, visited the Grand Palace in Bangkok.<sup>152</sup>

King Bhumibol amassed such reverence through various means. To begin, King Bhumibol amassed a great network of allies in the Thai government, business, and the military.<sup>153</sup> Along with the help of the United States government, which viewed Thailand as a key ally in South East Asia in its Cold War diplomacy, King Bhumibol positioned himself as an impediment to the spread of communism and a champion of the poor.<sup>154</sup> Adding to this concern for the most disadvantaged members of Thai society, King Bhumibol instituted the well–praised Royal Project Foundation, which implemented over 3,000 projects between 1952 and 2018.<sup>155</sup> The projects brought increased wealth to the predominantly rural and impoverished areas northern and eastern Thailand by replacing the cultivation of opium with coffee and other temperate fruit crops and through instituting other agricultural reforms and projects.<sup>156</sup> For these projects, the United Nations awarded King Bhumibol the United Nation’s first Human Development Lifetime Achievement Award.<sup>157</sup> Finally, the King emerged as a critical dispute–resolution figure in a country renowned for tumult.<sup>158</sup> The King epitomized this role in the 1992 Asian Financial Crisis when he brokered a deal between Thailand’s military leader and opposition ruler amidst threats of violent upheaval.<sup>159</sup> Television footage immortalized this moment with the prime minister and opposition leader kneeling side by side, prostrated, and bowing before the King like a father figure.<sup>160</sup> The *Washington Post* reported the next day, “Who will soon forget the remarkable picture of the military ruler and the opposition leader together on their knees before the king of Thailand?”<sup>161</sup>

In 2016, King Bhumibol Adulyadej passed away, and King Maha Vajiralongkorn (Rama X) ascended to the throne.<sup>162</sup> By all accounts, King Vajiralongkorn has found it difficult to fill his father’s shoes and has not garnered the same popularity amongst the Thai citizenry.<sup>163</sup> Factors such as his spending most of his time in Bavaria without appointing a regent,<sup>164</sup> his affinity for

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<sup>151</sup> *Remembering Thailand’s Beloved King Bhumibol*, AL JAZEERA (Oct. 13, 2016), <https://www.aljazeera.com/features/2016/10/13/remembering-thailands-beloved-king-bhumibol>.

<sup>152</sup> See Amy Sawitta Lefevre & Panu Wangcha-um, *Thousands Queue to Pay Last Respects to Thailand’s Late King Bhumibol*, REUTERS (Oct. 5, 2017), <https://www.reuters.com/article/us-thailand-king-mourners/thousands-queue-to-pay-last-respects-to-thailands-late-king-bhumibol-idUSKBN1CA09H/>; see also P. Michael Rattanasengchanh, *U.S.-Thai Public Diplomacy: The Beginnings of a Military-Monarchical-Anti-Communist State, 1957-1963*, 23 J. OF AM.-EAST ASIAN RELS. 56, 56–87 (2016).

<sup>153</sup> See Kurlantzick, *supra* note 140.

<sup>154</sup> See *id.*

<sup>155</sup> See *Remembering Thailand’s Beloved King Bhumibol*, AL JAZEERA (Oct. 13, 2016), <https://www.aljazeera.com/features/2016/10/13/remembering-thailands-beloved-king-bhumibol>.

<sup>156</sup> See *id.*; *Profile: King Bhumibol Adulyadej*, BBC (Oct. 10, 2016), <https://www.bbc.com/news/world-asia-29502450> see also *The Royal Project of North Thailand*, GREEN TRAILS, <https://www.green-trails.com/the-royal-project-of-north-thailand/> (last accessed on Feb. 20, 2024).

<sup>157</sup> See BBC, *supra* note 156.

<sup>158</sup> See HANDLEY, *supra* note 149, at 2.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> *The King and They*, WASH. POST (May 23, 1992), <https://www.washingtonpost.com/archive/opinions/1992/05/23/the-king-and-they/c705f07d-c543-4b65-8d2b-b4daa0252a77/>.

<sup>162</sup> See Barbara Crossette, *Bhumibol Adulyadej, 88, People’s King of Thailand, Dies After 7-Decade Reign*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/14/world/asia/thai-king-bhumibol-adulyadej-dies.html>; Terry Fredrickson, *Thailand’s New King*, BANGKOK POST (Nov. 26, 2016), <https://www.bangkokpost.com/learning/advanced/1147264/thailand-new-king>.

<sup>163</sup> See, e.g., Richard Bernstein, *Thailand’s Playboy King Isn’t Playing Around*, VOX (Jan. 24, 2020), <https://www.vox.com/2020/1/24/21075149/king-thailand-maha-vajiralongkorn-facebook-video-tattoos>.

<sup>164</sup> See Giulia Saudeli, *Thai King Should Not Reign From German Soil, Berlin Says*, DEUTSCHE WELLE (Oct. 16, 2020), <https://www.dw.com/en/thailands-king-should-not-reign-from-german-soil-berlin-says/a-55304033> (detailing that the King predominantly lives in Bavaria to the chagrin of both Thais and Germans).

wearing a crop top both in Bangkok and Bavaria,<sup>165</sup> violating Covid-19 safety protocols,<sup>166</sup> his third wife's unexplained status,<sup>167</sup> and the mysterious deaths of lèse-majesté and junta dissenters in Laos have all resulted in the monarchy's esteem falling to new lows.<sup>168</sup>

King Bhumibol and King Vajiralongkorn's relative reverence and irreverence in Thai society help explain the changes in the lèse-majesté law. A few years into the reign of King Bhumibol, Thailand removed the exclusion clause and has not reinstated it since.<sup>169</sup> Moreover, a few years into the reign of King Vajiralongkorn's Thailand suspended enforcing Section 112 from 2018 until the student protests in 2020.<sup>170</sup> In this way, the lèse-majesté legal regime has accommodated the Kingdom's changing reverence for its monarchy and its monarchs.

### III. Buddhism and The King as Bodhisattvas

Thailand is an overwhelmingly Buddhist country.<sup>171</sup> Between eighty-five to ninety-five percent of the population identifies as Theravada Buddhist, and isolated Muslim populations in the far southern provinces of the country account for the majority of the remaining five to fifteen percent.<sup>172</sup> Well over half of Thais believe in reincarnation, whereby moral actions and decisions in an individual's life help to dictate the birth circumstances of that individual's next life.<sup>173</sup>

Buddhism and reincarnation help to explain how Thai citizens continue to tolerate, maintain, and even celebrate the monarchy and Section 112 in a world that has increasingly turned away from the monarchy.<sup>174</sup> The Buddhist basis for monarchy relies on the premise that those born into royalty in the present life must have lived especially virtuous and moral past lives that justify their favorable birth circumstances in the present life.<sup>175</sup> On top of the social and material privileges that come with being born into royalty, Kings and the monarchy are considered Bodhisattvas—adding a divine-like status to the throne.<sup>176</sup> Thai Buddhism and history scholar Chris Baker writes that for many centuries, “Kings were identified as bodhisattvas, Buddhas-to-be, accumulating merit through successive lives, and credited with superhuman abilities. When this formulation emerged

<sup>165</sup>See Michael Peel, *The Crown and The Crop Top: the King of Thailand in Six Objects*, ECONOMIST (Nov. 24, 2020), <https://www.economist.com/1843/2020/11/24/the-crown-and-the-crop-top-the-king-of-thailand-in-six-objects> (explaining the King's unorthodox wardrobe).

<sup>166</sup>See John Berthelsen, *Thailand's Controversial King Outrages Subjects*, ASIA SENTINEL (Apr. 6, 2020), <https://www.asiasentinel.com/p/thailands-controversial-king-outrages> (detailing the King's breaking quarantine and other Covid-19 safety measures).

<sup>167</sup>See Pavin Chachavalongpun, *Why Thais are Losing Faith in the Monarchy*, WASH. POST (May 15, 2020), <https://www.washingtonpost.com/opinions/2020/05/15/why-thais-are-losing-faith-monarchy/> (reporting on the King's third wife's, Sriramsi, mysterious status following her house arrest in Bavaria).

<sup>168</sup>See Ann Norman, *What do Thailand and Saudi Arabia Have in Common?* WASH. POST (Jan. 30, 2019), <https://www.washingtonpost.com/opinions/2019/01/30/what-do-thailand-saudi-arabia-have-common/>; (explaining the military and the King's harmonious relationship in the lead-up to the 2019 general election); Chachavalongpun, *supra* note 167 (providing a general explanation of the King's unpopularity); Berthelsen, *supra* note 166 (providing a similar overview).

<sup>169</sup>See Chachavalongpun, *supra* note 167; Berthelsen, *supra* note 166 (providing a similar overview).

<sup>170</sup>See Chachavalongpun, *supra* note 167; Berthelsen, *supra* note 166 (providing a similar overview).

<sup>171</sup>See U.S. DEP'T OF STATE OFFICE OF INT'L RELIGIOUS FREEDOM, *2020 Report on International Religious Freedom: Thailand* (May 12, 2021), <https://www.state.gov/reports/2020-report-on-international-religious-freedom/thailand/>.

<sup>172</sup>See *id.*

<sup>173</sup>See *Id.*; see also, *Thai Monk Cuts Off his Own Head in Hopes of Reincarnation as Higher Being*, VICE NEWS (Apr. 21, 2021), <https://www.vice.com/en/article/bvz83a/thailand-monk-suicide-buddhism>; PETER HARVEY, AN INTRODUCTION TO BUDDHISM, 32–33, 38–39, 46–49 (2012).

<sup>174</sup>See John Zumbun, *Some Monarchs Endure, but Monarchies Are in Decline*, WALL STREET J. (Sept. 16, 2022), <https://www.wsj.com/articles/some-monarchs-endure-but-monarchies-are-in-decline-11663320634> (providing a statistical overview of the decline of monarchies in the 19th and 20th centuries—to summarize roughly 35% of the world's population lived under monarchic rule in 1950 compared with only 10% today).

<sup>175</sup>See Chris Baker, *Buddhism and Authority in Thailand in the Long Run*, NEW MANDALA (Aug. 14, 2019), <https://www.newmandala.org/buddhism-and-authority/>.

<sup>176</sup>See *id.*

is unclear, but it was present . . . in the 17<sup>th</sup> century, and flourished in the 18<sup>th</sup>.<sup>177</sup> This perception of the King has waned in modern Thailand, but still, to this day, the coronation rituals transform the prince into a “Devaraja, or divine embodiment of the Gods.”<sup>178</sup> Thus, within the Buddhist tradition, having been born into monarchy denotes a divine-like status in the present life that is justified by merits and virtuous acts in an individual’s previous lives.

The role Buddhism plays in Thailand and the role the monarchy plays within Buddhism helps explain why Thailand has come down on the side of deterring and compensating injury to the monarchy as opposed to allowing for more speech when crafting its *lèse-majesté* regime. With the monarchy as the embodiment of the Buddha, it is no surprise that the law would respect such an institution.<sup>179</sup>



## F. Conclusion

The U.S. defamation regime and the Thai *lèse-majesté* regime represent similar mechanisms to resolve the same legal issue: Balancing the interest in free speech with the interest in maintaining the reputation of individuals and institutions. Given the historical role that the monarchy has played in Thailand and the King’s embodiment of the Bodhisattvas in the Buddhist tradition, the Thai legal regime predictably favors maintaining the reputation of the monarchy with robust speech restrictions and enforcement. Still, at various points in Thai history when reverence for the monarchy waned, the Thai legal regime adjusted its balance in favor of more speech such as the period following the Siamese Revolution and the period following the accession of King Vajiralongkorn. Similarly, given the United States’ commitments to democratic constitutionalism, the U.S. regime predictably favors more robust speech. However, the U.S. legal regime accelerated its preference for more speech in earnest at the start of the twentieth century, due the prevailing

<sup>177</sup>*Id.*

<sup>178</sup>*Id.*; Patpica Tanakasempipat & Panarat Thepgumpanat, ‘I Shall Reign With Righteousness’: Thailand Crowns King in Ornate Ceremonies, REUTERS (May 3, 2019), <https://www.reuters.com/article/us-thailand-king-coronation/i-shall-reign-with-righteousness-thailand-crowns-king-in-ornate-ceremonies-idUSKCN1S924H/>.

<sup>179</sup>See OSAC, *supra* note 92.

attitudes and commitments of U.S. legal scholars, jurists, and thinkers, and the main Supreme Court rulings that expanded speech at the expense of defamation did not occur till the 1960s and 1970s.

And thus, the Thai and U.S. legal regimes both attempt to accommodate competing yet unequal and changing values in a resilient and supple manner. Perhaps if U.S. society constructed a phenomenon with the level of the esteem the Monarchy is held to in Thailand, U.S. First Amendment law would protect the institution in a similar manner to the way Thai *lèse-majesté* regime protects the monarchy. Similarly, if Thai society constructed a robust connection between Buddhism and free speech, perhaps the Thai legal regime would come to protect free speech in a manner similar to that of the First Amendment. While the Thai and U.S. regimes draw the line at different points, the two are not diametrically opposed regimes, as recent scholarship would suggest,<sup>180</sup> but rather are similar mechanisms used to accommodate competing, unequal, and changing interests through law.

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<sup>180</sup>See NuDelman, *supra* note 17; Baber, *supra* note 17.